

IN THE MATTER OF THE ARBITRATION BETWEEN:

| | | |
|-----------------------------------|---|--|
| FRATERNAL ORDER OF POLICE, |) | |
| LODGE 5, |) | |
| |) | |
| and |) | <u>Case Number 14 390 00184 10</u> |
| |) | |
| |) | |
| CITY OF PHILADELPHIA. |) | P/O Dwayne Jordan-Suspension and Transfer |

APPEARANCES

| | |
|---------------------|---------------------------------|
| <i>For the FOP:</i> | <i>Stephen J. Holroyd, Esq.</i> |
| | <i>Jennings Sigmond, P.A</i> |

| | |
|----------------------|---------------------------------|
| <i>For the City:</i> | <i>Cara E. Leheney, Esq.</i> |
| | <i>Assistant City Solicitor</i> |

| | |
|-------------|-------------------------------|
| Arbitrator: | Charles D. Long, Jr., Esquire |
|-------------|-------------------------------|

| | |
|------------------|-------------------|
| Date of Hearing: | December 14, 2010 |
|------------------|-------------------|

| | |
|-------------------|-------------------|
| Date of Decision: | September 7, 2011 |
|-------------------|-------------------|

BACKGROUND

The Grievant, P/O Dwayne Jordan ("Grievant"), has been a member of the Philadelphia Police Department for eighteen (18) plus years. In February and March, 2010, the Grievant received a twenty (20) day suspension and was transferred to a new assignment for Conduct Unbecoming an Officer. The Notice of Suspension provides:

In that on Tuesday, 08/11/09, you were inside the South Detectives Operations Room when you approached Detective M█████ D█████ #█████ who was seated at the front desk. According to Detective D█████, you inappropriately touched her on her cheek and around her lips with your tongue. Immediately after the incident, an upset Detective D█████ went to the bathroom. Detective T█████ S█████ #█████ was in the bathroom at the time and observed Detective D█████ visibly upset with tears in her eyes as she explained to Detective S█████ what you had just done. When interviewed, you stated that Detective did tell you "Your tongue touched my face," after greeting her on 08/11/09. After this disclaimer, you told her, "You haven't seen nothing yet," and stated that you "hugged her again and rubbed my beard across her face." Actions such as this are inappropriate. Your physical contact with Detective D█████ was not only unwelcome but improper in a work environment.

In addition to receiving a twenty (20) day suspension for the above violations, you were transferred from your assignment in South Detective Division to the 9th District.

The matter was heard by a Police Board of Inquiry (PBI) consisting of four (4) superior officers, none of which recommended a penalty of more than a four (4) day suspension. Upon review of the PBI's recommendation, the Police Commissioner imposed a twenty (20) day suspension and the transfer of the Grievant outside the South Detective Division.

Unable to resolve the resulting grievance, the Union filed for arbitration. The arbitration hearing was held on December 14, 2010. During the hearing the parties

provided sworn testimony and documentary evidence in support of their respective positions. Upon receipt of an affidavit from the Police Commissioner in May, 2011, the record closed. Closing argument was in the form of written post-hearing briefs received by the arbitrator on August 26, 2011. The following discussion and decision result from the record thus compiled.

ISSUE

The parties stipulated to the following issue:

Was the discipline assessed to the Grievant for just cause?
If not, what is the appropriate remedy?

POSITIONS OF THE PARTIES

Union: The Union argues that the Commissioner abused his authority when he significantly increase the penalty recommended by the PBI consisting of members of the Commissioner's Command Staff. In reaching their conclusions, the members of the PBI were personally privy to the investigation conducted by Police Department's Equal Employment Opportunity Unit, including the initial complaint filed by Detective Dotson, and personal interviews conducted by the Department's EEO investigating officer with Detective Dotson, Detective Selden and the Grievant. The Commissioner, on the other hand, had no first-hand knowledge of the incident as he did not participate in the investigation nor did he communicate directly with any of those involved.

Alternatively, the Union argues that even if one accepts the Commissioner's freedom to impose his will in disciplinary matters, the severity of the discipline imposed upon the Grievant in this matter far outweighs the gravity of the offense and is, therefore,

inappropriate.

City: The City argues that because the Grievant pleaded guilty to the charges, the sole issue before the arbitrator is whether the discipline is an appropriate response to his admitted misconduct. Alternatively, even if the City is required to prove the underlying conduct, it has satisfied its burden, in this regard.

The City also contends that, considering the egregious nature of the Grievant's conduct, the twenty (20) suspension and transfer was appropriate discipline. Failure to conduct a thorough investigation and, based thereon, to initiate significant corrective action could have exposed the Department to significant liability.

The Pennsylvania courts have held that sexual harassment creates a hostile working environment. Because female police officers and civilian employees comprise less than 20% of the employees assigned to the South Detective Division, transferring the Grievant was a necessary step to effectively demonstrate to the entire Division that sexual harassment would not be tolerated.

DISCUSSION

The concept of just cause consists of two (2) essential elements: 1) proof of underlying conduct by the Grievant; and (2), the imposition of reasonable discipline when considering all of the surrounding relevant circumstances. The burden of proving both elements rests with the employer.

With one exception, the underlying material facts are not disputed. Detective D [REDACTED] and the Grievant were friends who occasionally saw each other outside of work. They would occasionally hug each other as friends do. They never kissed each other and

were not romantically or physically involved.

The significant difference in their testimony at the arbitration hearing is that, contrary to Detective D [REDACTED]'s assertion, the Grievant denies licking Detective D [REDACTED] with his tongue. The Grievant admits that he intentionally rubbed his beard across Detective D [REDACTED]'s face and, when she complained, telling her "you ain't seen nothing yet." The City argues that in light of the Grievant's guilty plea, it need not prove the occurrence of the underlying conduct as set forth in the initial statement of charges. I agree.

Regardless, credibility considerations cause me to credit the testimony of Detective D [REDACTED] concerning what occurred over that of the Grievant. Visibly upset, Detective D [REDACTED] informed her supervisor of what had transpired. She went to the ladies' room where she also informed Detective T [REDACTED] S [REDACTED] what had transpired. When Detective S [REDACTED] later observed the Grievant making light of the situation she chastised him stating, "this is a serious matter." Later, after Detective D [REDACTED] informed the Grievant she was offended by his behavior, he apologized to her.

On September 28, 2009, the Grievant pled "guilty" to the conduct set forth in the Statement of the Charges Filed And Action Taken dated September 17, 2009. The conduct set forth, therein, includes two (2) separate incidents of the Grievant licking Detective D [REDACTED]'s face with his tongue. The Grievant testified that he pled guilty only because his supervisor stated that the incident did not constitute a serious matter and most likely warranted a reprimand. This statement was confirmed to the Grievant by his Captain. Relying upon these statements, the Grievant testified he just wanted the incident over and was, therefore, willing to plead guilty to inappropriate conduct.

Notably, however, just above the Grievant's signature admitting his guilt appears the following statement: "I understand that in Pleading Guilty to matters which do not qualify for Command Level Discipline, my Commanding Officer shall make a recommendation concerning a penalty. The Police Commissioner shall not be bound by that recommendation." The Grievant cannot now withdraw his guilty plea because at the time he was led to believe by two officers (who were subordinate to the Commissioner) that a reprimand was appropriate punishment.

The parties acknowledge that, in addition to state law, the prohibition of sexual harassment is set forth both in the Mayor's Statement of Policy and the Police Department's Internal Directive No. 97. The penalty for a first violation of Article One of the Disciplinary Code, Conduct Unbecoming an Officer, section 1.00, Unspecified, ranges from a reprimand to dismissal.

Citing two prior arbitration awards, the Union argues that the Police Commissioner exceeded his authority by significantly increasing the penalty recommended by the PBI. It is the Union's position that the purpose of the Commissioner's review of a PBI decision "is to establish consistency and to insure due process, not to act as a separate tribunal in retrying the issues and negate the findings of the Police Inquiry Board." Arbitrator Walter Powell in *FOP Lodge 5 v. City of Philadelphia*, AAA Case No. 14 390 00339 95 (October 29, 1996). Arbitrator Powell's position was echoed by Arbitrator Kathleen Davis who concluded that "where there was no new evidence produced that suggested that a higher penalty was appropriate, the lesser penalty should stand." *FOP Lodge 5 v. City of Philadelphia*, AAA Case No. 14-390 01841 96 (September 1, 1997).

The City, on the other hand, cites a case by Arbitrator Catherine Hogan in support of the Commissioner's final authority in meting out discipline. Arbitrator Hogan opined, "The Commissioner is not bound by the PBI recommendation. It is the Commissioner who assesses discipline under the collective bargaining agreement and it is the Commissioner who must be held accountable." *FOP Lodge 5 v. City of Philadelphia*, AAA Case No. 14-390-0990-99 (April 6, 2001).

While the Union' position is not without some merit, I find Arbitrator Hogan's view the more compelling. The police department is a para-military organization in which the Commissioner retains the ultimate authority. The Commissioner's authority to determine and impose appropriate discipline is not of recent vintage. To the contrary, it has existed for many years under numerous police commissioners. It is a well-established policy which is universally understood throughout the police department. It is set forth in every Statement Of Charges And Action Taken resulting in disciplinary action. The authority of this arbitrator is limited to interpreting and applying the terms of the collective bargaining agreement. This does not include changing long-term internal departmental policy. Most importantly, regardless of who has the ultimate authority to determine and impose discipline, the decision is ultimately subject to review through the contractual grievance and arbitration procedure.

The most compelling circumstance in resolving this matter is the inherent nature of the Grievant's action. By any reasonable standard, the Grievant's conduct was egregious and offensive. His actions were directed toward a single individual who bears no responsibility for the incident. Even after the severity of his misconduct was brought to his attention he showed little appreciation for the severity of his actions or the anguish

he inflicted upon Detective D [REDACTED]. This is evidenced not only by his initial reaction immediately following the incident but also by the tenor of his EEO interview on September 9, 2009, approximately three (3) week later.

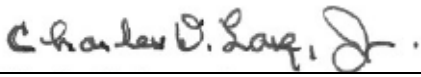
Although I do not believe that the Grievant acted with malice, the fact is that he acted intentionally. His conduct was totally unacceptable and inexcusable, a fact the Grievant should have realized before hand. The fact that the Grievant and Detective D [REDACTED] were friends and periodically joked with each other was not a license for him to invade her personal space and engage in verbal and physical conduct repugnant to most socially sensitive individuals, particularly when she was working at the in-take desk in a public area.

Considering these circumstances, significant discipline was appropriate in order to assure not only the females assigned to South Detectives but also their male counter-parts that acts of sexual harassment would not be tolerated.

DECISION

The discipline assessed to the Grievant was for just cause

September 7, 2011
(Date)



Charles D., Long, Jr.,
Arbitrator